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No. 92-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY,
Petitioner,

v.

ROBERT B. REICH, as Secretary of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a federal district court has jurisdiction to hear pre-enforcement and collateral challenges on constitutional and federal question grounds to an administrative application of the Mine Safety and Health Act which directly conflicts with a statutory right granted under a separate federal statute over which the administrative agency has no jurisdiction or expertise.

PARTIES TO THE PROCEEDING

The parties before this Court are all listed in the caption.

Petitioner Thunder Basin Coal Company ("Thunder Basin") is a wholly-owned subsidiary of Atlantic Richfield Company. Thunder Basin has no subsidiaries.

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

This case arises from decisions of the United States District Court for the District of Wyoming granting Thunder Basin's Motion for Preliminary Injunction (Pet. App. 24-30)[1] on March 21, 1991 and denying the Secretary of Labor's Motion to Dismiss (Pet. App. 19-23) on May 20, 1991. The Judgment and Opinion of the Tenth Circuit (Pet. App. 1-16), reversing the District

[1] "Pet. App." refers to the appendix to the Petition for Writ of Certiorari.

Court's decisions, was entered on July 20, 1992. *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970 (10th Cir. 1992). Thunder Basin's timely Petition for Rehearing with Suggestion for Rehearing En Banc was denied by the Tenth Circuit on August 28, 1992 (Pet. App. 17-18).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 62 Stat. 928, 102 Stat. 662, 28 U.S.C. § 1254(1). The District Court's jurisdiction was invoked pursuant to 62 Stat. 964, 28 U.S.C. §§ 2201-2202 (1988) and 62 Stat. 930, 28 U.S.C. § 1331. This Court granted the Petition for a Writ of Certiorari on March 8, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Thunder Basin asserts a violation of the Due Process clause of the Fifth Amendment of the United States Constitution. The issues also present a conflict between two federal statutes: the National Labor Relations Act of 1935 ("NLRA"), 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 141-187, *as amended*, and the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 83 Stat. 742, 91 Stat. 1290, 93 Stat. 695, 30 U.S.C. §§ 801-962, *as amended*. The relevant provisions of the Mine Act appear in the Appendix to the Petition for Writ of Certiorari (Pet. App. 31-35).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Thunder Basin operates the Black Thunder Mine with a nonunion work force of 500 employees (J.A. 7-8).[2] The mine, a large coal mine located near Wright, Wyoming, has been in operation since 1977 (J.A. 8). Thunder Basin has never recognized any union as a representative

[2] References to "J.A." are to the joint appendix.

of its employees under the NLRA. Its employees specifically rejected the United Mine Workers of America ("UMWA") as their representative by a vote of 307 to 56 in a National Labor Relations Board ("NLRB") election in 1987, the only representation election held at Thunder Basin by the NLRB. Thunder Basin has consistently exercised its right under the NLRA to deny nonemployee union organizers access to its records and property (J.A. 8-9).

A. UMWA Use of The Mine Act For Representational Purposes

In 1990, the UMWA initiated a new organizing tactic at Thunder Basin and other neighboring mines. It sought to have one of its staff union organizers and another UMWA employee, as well as the union itself (hereinafter collectively referred to as "UMWA"), designated under the Mine Act as a "representative of miners" (the "UMWA Designation").[3] The Mine Safety and Health Administration ("MSHA"),[4] without affording Thunder Basin any hearing opportunity, granted the requested UMWA Designation (J.A. 11-13).

The designation "representative of miners" gives the UMWA broad access to the operations of the mine, its records, and its employees. A representative of miners has the right to request that MSHA inspect a mine and to accompany MSHA inspectors in conducting the physical examination of the mine (30 U.S.C. § 813(f), (g)). The representative may participate in pre- and post-inspection conferences and has the opportunity to review many internal mine operations records (30 U.S.C.

[3] The Act provides certain rights to "a representative authorized by . . . miners." 30 U.S.C. § 813(f). MSHA's implementing regulations provide that "any person or organization which *represents* two or more miners" may be a "representative of miners." 30 C.F.R. § 40.1(b)(1) (emphasis added).

[4] Respondents are hereafter collectively referred to as "MSHA."

§ 813(c), (f)).[5] A representative of miners also can initiate and participate in certain administrative proceedings against the mine operator under the Mine Act.[6] Designation as a representative of miners is permanent, and can be withdrawn only by the representative personally (30 C.F.R. § 40.5).

B. MSHA Insistence on UMWA Designation

MSHA directed Thunder Basin to honor the UMWA Designation. Thunder Basin protested, emphasizing that the UMWA Designation was nothing more than a further attempt to unionize Thunder Basin's employees (J.A. 12-13, 31-33). The protest pointed out that the rights granted the UMWA and its staff organizer and staff employee—neither of whom are Thunder Basin employees —compromised Thunder Basin's rights under the NLRA and abused the purposes of the Mine Act (J.A. 31-33).

MSHA rejected Thunder Basin's protest and advised Thunder Basin that it must honor the UMWA Designation (J.A. 12-13, 49-50). MSHA confirmed that if Thunder Basin failed to comply with the UMWA Designation, MSHA would issue a citation (J.A. 13-14, 48).

[5] The records include those of certified and qualified mine personnel (30 C.F.R. § 77.106), records of testing, examination or maintenance of a variety of equipment (30 C.F.R. §§ 77.704-8, 77.800-2, 77.900-2, 77.104, 77.1110, 77.1403, 77.1404, 77.1433, 77.1606, and 77.1906), records of evacuation plans (30 C.F.R. § 77.1101), and daily inspection reports (30 C.F.R. § 77.1713).

[6] In addition to the right to request inspections (30 U.S.C. § 813(g)) and receive copies of documents which MSHA sends to a mine operator (30 U.S.C. § 819(b)), the representative of miners can challenge the issuance, modification or termination of certain enforcement actions against a mine operator and contest the reasonableness of time a mine operator is given to correct alleged violations of Mine Act regulations (30 U.S.C. §§ 815(d), 817(e)). A representative of miners may also initiate proceedings to modify the application of regulations under 30 C.F.R. Part 44, participate as a party in those proceedings and in proceedings before the Federal Mine Safety and Health Review Commission (29 C.F.R. § 2700.4) and file and maintain an action prohibiting discrimination under 30 U.S.C. § 815(c).

C. Mine Act Enforcement By MSHA For Failure to Honor UMWA Designation

Thunder Basin can challenge the UMWA Designation only by refusing to comply with MSHA's order and receiving a citation from MSHA.[7] A mine operator may challenge the citation (30 U.S.C. § 815(d)) in an administrative hearing before an Administrative Law Judge (30 U.S.C. § 823(d)(1)), subject to further review by the Federal Mine Safety and Health Review Commission ("Review Commission") (30 U.S.C. § 823(d)(2)) and judicial review by the courts of appeals (30 U.S.C. § 816(a)(1)).[8]

If the citation is upheld, a civil penalty, which can be up to $50,000, must be assessed (30 U.S.C. § 820(a)), and criminal penalties may also be imposed on individuals and the company (30 U.S.C. § 820(c), (d)).[9] If a mine operator does not promptly correct the alleged violation to MSHA's satisfaction, a failure to abate order can issue closing the mine area affected (30 U.S.C.

[7] *See Kaiser Coal Corp. v. Secretary of Labor*, 10 FMSHRC 1165 (1988) (Administrative law judge and the Review Commission do not have jurisdiction to issue declaratory judgments absent the issuance of citation); *Secretary of Labor v. Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (1990) (refusing to issue a declaratory ruling on whether the NLRA precludes MSHA from designating the UMWA as miners' representative where no citation enforcement proceeding was pending).

[8] The court of appeals' review is limited to the administrative record developed below (30 U.S.C. § 816(a)(1)). The Review Commission's factual findings are deemed "conclusive" if supported by substantial evidence (*id.*).

[9] The amount of penalty assessable is governed by criteria in the Mine Act (30 U.S.C. §§ 815(b) and 820(i)) and MSHA regulations (30 C.F.R. §§ 100.1-100.8). Provision is made for specific increases in the penalty "where the operator does not abate within the time set by the inspector" (30 C.F.R. 100.3(f)). Failure to abate within the time set by the inspector also precludes qualifying for special lower penalties for violations that are not reasonably likely to result in serious injury or illness (30 C.F.R. § 100.4).

§ 814(b)). In addition, a failure to abate the violation creates the risk of civil penalties of up to $5,000 for each day of non-compliance (30 U.S.C. § 820(b)). A mine operator seeking challenge to a MSHA citation may avoid the imposition of daily penalties for non-compliance only by abating the alleged violation to MSHA's satisfaction in continuing to protest the citation in the administrative enforcement proceeding.

Thunder Basin's refusal to honor the UMWA Designation exposed it to MSHA's enforcement proceedings and serious penalties for non-compliance. Thunder Basin was aware that, contemporaneous with the events giving rise to the instant case, MSHA had explicitly threatened to impose the maximum allowable daily penalties against a neighboring nonunion mine operated by Kerr-McGee Coal Corporation ("Kerr-McGee") for failing to honor a similar UMWA Designation (J.A. 39-45). MSHA issued a citation and, upon determining that Kerr-McGee was refusing to honor the UMWA Designation, MSHA's inspector gave Kerr-McGee 15 minutes to comply (J.A. 36). When Kerr-McGee maintained its objection, MSHA issued a "no area affected" closure order for failure to abate within a reasonable time (*id.*). Even though MSHA understood that Kerr-McGee was asserting that the UMWA Designation compromised Kerr-McGee's NLRA rights and abused the purposes of the Mine Act (J.A. 43), MSHA nevertheless, on January 2, 1991, demanded abatement of the violation within 24-hours (J.A. 42-43) and threatened to impose the maximum allowable daily penalty, contending that Kerr-McGee's "continuous refusal to comply with the order demonstrates an apparent defiance to MSHA's enforcement sanctions" (J.A. 39) and "blatantly ignor[es] the agency's order to abate" (J.A. 40). Under the explicit threat of daily penalties, Kerr-McGee immediately capitulated and honored the UMWA Designation under protest while it litigated its objection to the citation in the enforcement proceedings

(J.A. 44).[10] Two months later, on March 11, 1991, MSHA wrote to Thunder Basin insisting that the UMWA Designation at Thunder Basin's mine be honored (J.A. 49-50).

II. THE PROCEEDINGS BELOW

Faced with the same circumstances as Kerr-McGee—an explicit threat of a citation, potential severe penalties, including daily penalties during an administrative proceeding, and a long series of administrative and review proceedings to endeavor to protect its NLRA right to exclude nonemployee union organizers from its mine—Thunder Basin sought injunctive relief in federal district court before a citation issued.[11] Thunder Basin's complaint for injunctive and declaratory relief challenged MSHA's demand that it honor the UMWA Designation, asserting that MSHA had erroneously applied the term "represents" in 30 C.F.R. § 40.1(b)(1) by failing to construe the term in light of the employers' and employees' rights under the NLRA (J.A. 13-16). Thunder Basin alleged MSHA was seeking, by threat of substantial penalties, to coerce Thunder Basin to abandon its NLRA right to keep union organizers off its premises and to distort the balance in labor-management rights struck by Congress (J.A. 7-8). Thunder Basin further alleged that MSHA's coercive conduct, through use of the threat of severe sanctions to compel Thunder Basin to waive its NLRA rights before any administrative hearing, constituted a denial of due process of law in violation

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[10] Kerr-McGee's protest of the citation was ultimately rejected by the Administrative Law Judge, and that rejection was affirmed by the Review Commission. *Kerr-McGee Coal Corp. v. Secretary of Labor, Mine Safety & Health Admin.*, 15 FMSHRC ——, 1993 OSHD (CCH) ¶ 30,013 (1993), *appeal pending*, Case No. 93-1250 (D.C. Cir.).

[11] MSHA acknowledged at the preliminary injunction hearing that it was prepared to issue a citation and proceed against Thunder Basin in the same manner as it had with Kerr-McGee (J.A. 47-48).

of the Constitution (J.A. 16). Thunder Basin also pointed out that the Review Commission had previously refused to construe the Mine Act with reference to federal labor law (J.A. 14-15).[12] The district court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 because the controversy arose under the laws of the United States, including the NLRA, the Mine Act and the U.S. Constitution (J.A. 6-7).

After a hearing, the district court found irreparable harm and granted a preliminary injunction precluding MSHA from requiring Thunder Basin to comply with the UMWA Designation pending a full hearing on whether the UMWA could properly be a representative of miners under the Mine Act consistent with Thunder Basin's NLRA rights (Pet. App. 24-30). It concluded (Pet. App. 28):

> Plaintiff has also shown that the UMWA's alleged interest in mine safety and health may be merely a ruse for gaining entry to plaintiff's Black Thunder property to attempt union organization efforts. Such potential abuse of MSHA by the UMWA poses the risk of serious harm to plaintiff.

The district court also found the administrative remedies would not adequately prevent this harm (Pet. App. 28):

> Additionally, plaintiff has demonstrated that it will be subject to considerable fines and penalties, some levied on a daily basis, if it stands on its LMRA [NLRA] rights and refuses to post the UMWA representative designation. Plaintiff could seek administrative remedies, but only after a MSHA citation has issued, and would be forced to proceed through

[12] *See also UMWA v. Peabody Coal*, 7 FMSHRC Dec. 1357 (1985) and *Secretary of Labor and UMWA v. Jim Walter Resources*, 7 FMSHRC Dec. 1348 (1985) (refusing to consider issues arising under the NLRA), *consolidated and aff'd*, 822 F.2d 1134 (D.C. Cir. 1987).

> administrative channels while such penalties accrued. Given this situation, it is apparent that plaintiff may suffer irreparably without injunctive relief.[13]

The Court of Appeals for the Tenth Circuit reversed the preliminary injunction order, holding that the district court lacked subject matter jurisdiction to prevent the allegedly improper administrative action by MSHA. Focusing on the Mine Act's grant of jurisdiction to the circuit courts over Review Commission orders, the court of appeals concluded that Congress had intended to preclude district court jurisdiction to review pre-enforcement challenges to administrative action, even if based on constitutional or other statutory grounds (Pet. App. 1-16).[14] The court of appeals limited its decision to the issue of jurisdiction and did not reach the merits of the preliminary injunction determination (Pet. App. 2, 7-8).

Thunder Basin petitioned for a writ of certiorari from this Court, citing a direct conflict between the Tenth

[13] Subsequently, the district court denied the government's motion to dismiss the complaint for lack of subject matter jurisdiction and failure to exhaust administrative remedies. The district court found the Mine Act administrative review process did not provide the appropriate forum for consideration of Thunder Basin's claims (Pet. App. 19-23). In rejecting the claim that Thunder Basin must first exhaust its administrative remedies under the Mine Act, the district court reasoned that Thunder Basin's statutory conflict and due process claims are outside the special expertise of the Review Commission, and therefore that exhaustion is unnecessary where, as here, a party challenges an agency's procedures on constitutional grounds (Pet. App. 22).

[14] The court of appeals further rejected the district court's finding that administrative remedies were not adequate to protect Thunder Basin's due process rights, noting that a hearing is provided before any penalty is imposed (Pet. App. 12). The court of appeals dismissed the likelihood that Thunder Basin would be subjected to substantial civil or criminal penalties, relying upon MSHA's assurances in briefs before the court that in a "factually close case" stiff supplemental penalties would not be imposed where a genuine interpretative question was raised and that criminal penalties are "unlikely" (Pet. App. 12-13).

Circuit's decision and *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *amended*, 781 F.2d 57 (6th Cir. 1986), which held that district courts had jurisdiction to consider a pre-enforcement claim that certain Mine Act procedures violated a mine operator's due process rights.[15] The court of appeals in the case below expressly repudiated the reasoning of *Southern Ohio Coal* that district courts had jurisdiction to consider constitutional challenges to Mine Act procedures. Thunder Basin also cited the conflict between the Tenth Circuit's decision and *Bituminous Coal Operators' Ass'n, Inc. v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977).

SUMMARY OF ARGUMENT

This Court has consistently found jurisdiction lies in federal district courts to hear pre-enforcement and collateral challenges to final agency action absent clear evidence that Congress intended to preclude such challenges. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Traynor v. Turnage*, 485 U.S. 535 (1988);

[15] The district court had relied on *Southern Ohio Coal* and had quoted extensively from that opinion in reasoning that it had jurisdiction to consider the constitutional and statutory conflict challenges raised by Thunder Basin's complaint, as follows:

> Under the Mine Act, the courts of appeals and not the district courts have jurisdiction to review the Commission's orders. 30 U.S.C. § 816. *The Act, however, does not expressly preclude district court jurisdiction* . . . [W]hen the issue to be adjudicated is one that is within the domain of agency expertise, then the statutorily provided judicial review procedure is exclusive. *Questions concerning the constitutionality of rules or statutes, however, are not the type of questions that are within an agency's domain of expertise. Rather, responsibility to deal with questions of constitutional interpretation lies in the federal courts, both at the trial and appellate levels.* (Emphasis added by the district court.)

(Pet. App. 21-22) (*quoting* from *Southern Ohio Coal*, 774 F.2d at 700).

Mathews v. Eldridge, 424 U.S. 319 (1976); *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991). Thunder Basin's challenge to MSHA's action here falls squarely within this precedent.

1. Nothing in the statutory language or the legislative history of the Mine Act evinces a Congressional intent to preclude the pre-enforcement and collateral challenges brought by Thunder Basin. The Mine Act's provisions for court of appeals review of final orders of the Review Commission do not preclude pre-enforcement and collateral challenges of MSHA's actions in district court where justiciable federal question issues are presented. *Abbott Laboratories* holds that such a scheme of appellate review does no more than evince a legislative intention "to assure adequate judicial review of such agency decisions, and . . . does not manifest a congressional purpose to eliminate judicial review of other kinds of [challenges to] agency action." 387 U.S. at 144. Indeed, because the jurisdiction of the court of appeals is specifically limited to considering final orders of the Review Commission, the hearings/appeal provisions of the Mine Act support the conclusion that Congress intended to retain the general federal question jurisdiction of the district courts to hear pre-enforcement and collateral challenges.

The legislative history of the Mine Act further supports the conclusion that the district court had jurisdiction here. The legislative history shows that Congress was well aware that the predecessor to the Mine Act (the Coal Act) had been construed to allow pre-enforcement review by district courts. *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 243 (4th Cir. 1977). Significantly, in drafting the Mine Act, Congress did not act to reverse *Bituminous Coal* when it adopted the Coal Act's hearing/appellate review provisions for the Mine Act, thereby indicating that it intended to allow pre-enforcement challenges as raised in *Bituminous Coal* to continue under the Mine Act. *Lorrillard v. Pons*, 434

U.S. 575, 580-81 (1978). In the absence of any evidence of a contrary intention, there is no clear and convincing evidence of a legislative intention in the Mine Act to preclude pre-enforcement and collateral challenges in federal district courts.

2. Thunder Basin's complaint under 28 U.S.C. § 1331 raised substantial claims of statutory conflict and constitutional deprivation appropriate for the grant of federal question jurisdiction, and the claims were justiciable and ripe for judicial review.

(a) Administrative action in derogation of a statutory right is a clear basis for federal question jurisdiction. *Traynor v. Turnage*, 485 U.S. 535 (1988); *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233 (1968); *Leedom v. Kyne*, 358 U.S. 184 (1958). Here, Thunder Basin presented a substantial claim that a reviewable statutory conflict existed because MSHA's UMWA Designation directly conflicted with Thunder Basin's right under the NLRA "to exclude nonemployee union organizers from his property." *Lechmere, Inc. v. NLRB*, —— *U.S.* ——, 112 S. Ct. 841, 845 (1992). Pre-enforcement judicial review of this statutory conflict is particularly appropriate here because MSHA and the Review Commission have no expertise, nor any interest, in interpreting and applying the NLRA. Under these circumstances, where agency action has failed to recognize rights protected under another statute outside the exclusive domain of the agency, this Court has held that federal question jurisdiction exists to resolve the statutory conflict. *Traynor v. Turnage, supra.*

(b) Thunder Basin's complaint also charged that the administrative citation and review procedures under the Mine Act violate the Due Process clause, as applied here. The coercive power of the threatened statutory penalties—and particularly MSHA's strong-arm tactic of threatening to impose penalties of up to $5,000 per day for refusal to submit immediately to MSHA's UMWA Designation

order—would effectively force Thunder Basin to relinquish its clear and protected NLRA rights even before the administrative review process has begun, thereby depriving it of a "meaningful" opportunity to obtain effective review of the designation order and the citation enforcing it. *Mathews v. Eldridge*, 424 U.S. at 331. This coercion is more than merely hypothetical. MSHA used the threat of mounting daily penalties to obtain the rapid capitulation of Kerr-McGee in the same circumstances just a few months prior to the events giving rise to the complaint in this case. The forced relinquishment of NLRA rights by threatened imposition of severe penalties during the administrative process raised a sufficiently justiciable claim to have the constitutional challenge heard by the district court under Section 1331. The Due Process claim is collateral to the question of the merits of Thunder Basin's opposition to MSHA's UMWA Designation and, therefore, raised a separate legal question over which the district court had clear jurisdiction to decide. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Mathews v. Eldridge, supra.*

(c) The statutory and constitutional challenges raised in the complaint were justiciable and ripe for review under *Abbott Laboratories* and its progeny. Thunder Basin's challenge to MSHA's UMWA Designation raised purely legal issues: the interrelationship of the Mine Act and the NLRA, and the constitutionality of the Mine Act administrative procedures in the circumstances here. MSHA's UMWA Designation constituted a final decision for purposes of judicial review: it represented the MSHA's unequivocal position to which Thunder Basin was expected to modify its day-to-day business conduct or face agency enforcement. Because MSHA's UMWA Designation represented the culmination of MSHA consideration of the matter, with enforcement proceedings in the wings, Thunder Basin was not required to exhaust further administrative procedures by pursuing constitutionally-

defective enforcement hearings before the Review Commission. Once the Court has determined that the pre-enforcement review is not barred by the Mine Act and that the matter is ripe for review under *Abbott Laboratories*, the question of further exhaustion of administrative remedies is already answered: the particular agency action under judicial review was already "final" for purposes of judicial review and was not subject to further administrative revision prior to enforcement. Further, this case falls into the well-established exceptions to the exhaustion doctrine. *See Coit Indep. Joint Venture v. Federal Sav. & Loan, Inc. Co.*, 489 U.S. 561, 585 (1989); *Reiter v. Cooper*, —— U.S. ——, 122 L.Ed.2d 604 (1993); *McCarthy v. Madigan*, —— U.S. ——, 117 L.Ed.2d 291 (1992).

3. The conclusion of the court of appeals that the district court lacked jurisdiction was predicated on fundamental errors—most significantly the failure to subject this case to the analytical framework established by this Court's precedent on pre-enforcement judicial review and collateral challenges. The judgment of the court of appeals dismissing the action for lack of subject matter jurisdiction should be reversed and the matter remanded for consideration on the merits.

ARGUMENT

I. INTRODUCTION: FEDERAL DISTRICT COURTS HAVE JURISDICTION TO HEAR PRE-ENFORCEMENT AND COLLATERAL CHALLENGES TO ADMINISTRATIVE ACTION ABSENT CLEAR AND CONVINCING EVIDENCE THAT CONGRESS INTENDED TO PRECLUDE SUCH ACTION.

A. The Issue Presented.

This case stems from MSHA's stringent application of its narrow regulatory interests without regard to the effect on statutory rights emanating from legislative judgments outside the agency's domain of expertise. MSHA, interpreting its regulations, insisted that Thunder Basin accept the UMWA and its professional organizers as "miner representatives" entitled to participate in safety inspections and related activities at its mine. Thunder Basin, whose nonunion employees overwhelmingly rejected the UMWA in an NLRB election, objected on the grounds that federal labor law permits it to keep non-employee union organizers off its premises and out of its records. MSHA's action subjected Thunder Basin to two stark choices: either abandon its NLRA right or defend itself in enforcement proceedings at the risk of civil and criminal penalties, including daily penalties for failing to abate the violation to MSHA's satisfaction after receiving a citation.

Recognizing that MSHA had no expertise in or inclination toward accommodating the conflicting statutory interests, Thunder Basin sought relief in federal district court before MSHA issued a citation. The question presented here is whether district court jurisdiction exists under 28 U.S.C. § 1331 to hear Thunder Basin's pre-enforcement and collateral challenge to MSHA's actions.

B. The Controlling Principles.

The controlling legal principles have been recognized by this Court on many occasions. This Court has "re-

peatedly acknowledged 'the strong presumption that Congress intends judicial review of administrative action.' *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986)." *Traynor v. Turnage,* 485 U.S. 535, 542 (1988). It has also repeatedly held this presumption "may be overcome 'only upon a showing of clear and convincing evidence of a contrary legislative intent.' *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967)." *Traynor,* 485 U.S. at 542. "[A]n aggrieved person will not be cut off [from judicial review] unless there is a persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories,* 387 U.S. at 140.

The presumption of judicial review is equally applicable to pre-enforcement challenges to administrative actions. Even where a statute provides for judicial review of agency determinations directly in the courts of appeals, pre-enforcement challenges in federal district court are appropriate absent "clear and convincing evidence" that Congress intended to preclude the action. *Abbott Laboratories v. Garder, supra; Gardner v. Toilet Goods Ass'n,* 387 U.S. 167 (1967).

Similarly, federal district courts have jurisdiction on the same basis to hear collateral challenges to agency actions on federal question and constitutional grounds. Where agency action has failed to recognize rights protected under another statute outside the exclusive domain of the agency, this Court has granted jurisdiction even in the face of statutory language limiting court review. *Traynor v. Turnage, supra.* And, where agency action has usurped a statutory right, jurisdiction has been found even though the statute limited court access. *Leedom v. Kyne,* 358 U.S. 184 (1958); *Oestereich v. Selective Serv. Sys. Local Bd.,* 393 U.S. 233 (1968). The Court has consistently found jurisdiction to hear collateral challenges to agency action on constitutional grounds absent clear and convincing evidence that Congress intended to preclude the action. *McNary v. Haitian Refugee Ctr.,*

498 U.S. 479 (1991); *Mathews v. Eldridge,* 424 U.S. 319 (1976).

Accordingly, these principles establish the presence of jurisdiction over this controversy unless the Mine Act precludes the action or Thunder Basin has failed to establish a justiciable claim of statutory conflict or constitutional infirmity. We demonstrate below that the Mine Act does not preclude jurisdiction over Thunder Basin's action, that the action raises justiciable issues under 28 U.S.C. § 1331 and that the Tenth Circuit, in finding no jurisdiction over the controversy, failed to apply the standards required by this Court in making that determination.

II. THE MINE ACT DOES NOT PRECLUDE PRE-ENFORCEMENT AND COLLATERAL CHALLENGES IN FEDERAL DISTRICT COURT.

Pre-enforcement and collateral challenges to agency action in federal district courts can be precluded only where there is "persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U.S. at 144. The "persuasive reason" necessary for preclusion was defined in *Abbott Laboratories* as "a showing of 'clear and convincing evidence' of a contrary legislative intent." *Id.* at 141 (quoting *Rusk v. Cort,* 369 U.S. 367, 379-80 (1962)). No such legislative intent can be ascertained from the Mine Act or its legislative history.

A. The Language of the Mine Act Suggests No Preclusion Intention.

Like the statute in *Abbott Laboratories,* the Mine Act contains "no explicit statutory authority" precluding pre-enforcement or collateral review. 387 U.S. at 141. *See Southern Ohio Coal Co. v. Donovan,* 774 F.2d 693, 700 (6th Cir. 1985) (the Mine Act "does not expressly preclude district court jurisdiction"); *Bituminous Coal Operators' Ass'n v. Secretary of Interior,* 547 F.2d 240, 243

(4th Cir. 1977) (appellate review provisions under the Coal Act, predecessor to Mine Act, did not preclude pre-enforcement judicial review because the Act neither stated nor implied that the appellate review procedure was to be exclusive).[16]

Nor does the statutory language imply any intention to preclude pre-enforcement challenges in federal district courts. In devising the administrative scheme of the Mine Act, Congress placed the essential administrative responsibility on the Secretary of Labor[17] and reserved quasi-judicial functions for the Review Commission where a citation or proposed assessment of penalty was contested (30 U.S.C. §§ 814 and 815). In matters before the Review Commission, Congress provided for a hearing, findings of fact and a decision and order on each contested issue (Section 815(d)). Congress provided that any person affected or aggrieved by a Commission order "may obtain review of such order" in the United States Court of Appeals (Section 816(a)).

This language does not manifest a legislative intention to preclude statutory conflict and constitutional challenges in the pre-enforcement context here. The provision in Section 816(a) calling for appellate review of a Commission "order" certainly cannot be fairly read as indicat-

[16] As discussed at pp. 22-23 *infra*, Congress was aware of the *Bituminous Coal* decision allowing pre-enforcement judicial review in the district courts when it adopted the Coal Act's administrative hearing/appellate review provisions in the Mine Act.

[17] The Secretary, whose functions are administered by MSHA, has responsibility under the Act to develop and promulgate mandatory health and safety standards (30 U.S.C. § 811), to conduct inspections and investigations of mines (§ 813), to issue citations and orders requiring withdrawal of miners from sections of the mine (§ 814), and to notify mine operators of proposed penalties for asserted safety and health violations (§ 815). Where MSHA's administrative determinations on citations and penalties are uncontested, Congress provided that they be deemed "final" and specifically provided they be "not subject to review by any court or agency" (§§ 815(a), 815(b)(1)(A)).

ing any intention to preclude pre-enforcement actions. By its express language, Section 816(a) applies only to review of orders issued by the Review Commission. Use of the words "order . . . issued under this Chapter," and "questions determined therein" in Section 816(a) modify appellate jurisdiction and indicate only that Congress intended that Review Commission decisions reach the courts of appeals after a full record is developed. As this Court concluded with respect to similar appellate review language in *Abbott Laboratories*, 387 U.S. at 144, such a provision does no more than evince a legislative intention "to assure adequate judicial review of such agency decisions, and . . . does not manifest a congressional purpose to eliminate judicial review of other kinds of [challenges to] agency action."[18]

The language of Section 816(a), in limiting appellate review only to final orders of the Review Commission, can be more fairly read as supporting an intention to allow pre-enforcement review in federal district courts where justiciable federal question issues are presented. That interpretation is consistent with this Court's presumption against preclusion absent clear evidence of a contrary intention. Moreover, this interpretation of the language is supported by the legislative history, discussed *infra* at pp. 21-23, showing that Congress, in incorporating into the Mine Act the appellate review provi-

[18] An expansion of exclusive appellate jurisdiction beyond "orders issued under this Chapter" not only ignores the plain language of the statute, but also runs counter to the Court's decision in *Johnson v. Robison*, 415 U.S. 360, 367 (1974), and *Traynor*, 485 U.S. 540. In those cases, the Court held that 38 U.S.C. § 211(a), which barred judicial review of "the decisions of the administrator on any questions of law or fact under any law administered by the Veterans' Administration . . ." did not bar federal courts from jurisdiction over constitutional and statutory conflict challenges to veterans' benefit legislation. The Court reasoned that constitutional and statutory conflict claims do not arise under the veterans' benefit legislation. Thunder Basin's similar claims of constitutional and statutory conflict likewise do not arise under the Mine Act.

sions of the prior Coal Act, knowingly let stand *Bituminous Coal*, 547 F.2d 240, permiting federal question jurisdiction in the district court under the Coal Act.

As this Court has noted, "when Congress intends to bar judicial review" it employs unambiguous language to that end. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 779-80 (1985). *See McNary v. Haitian Refugee Ctr.*, 498 U.S. at 479 (1991).[19] Indeed, Congress in the Mine Act specifically precluded *any* court review of MSHA determinations not contested within fixed time periods (30 US.C. § 815(b)(1)(A)) and in another section flatly stated that "no justice, judge or court of the United States shall" enjoin the enforcement of interim mandatory health or safety standards issued by the Secretary (30 U.S.C. § 960). These specific preclusions of court review in the Mine Act contrast sharply with the absence of any language of similar preclusion for the pre-enforcement and collateral challenges raised here. The failure of Congress to include an explicit bar to pre-enforcement and collateral challenges in district courts evinces a legislative intention not to preclude such challenges that are otherwise justiciable under established legal principles. This evident intention is further supported by a detailed analysis of the legislative history of the Mine Act.

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[19] Had Congress intended Section 816 to be preclusive, statutory language to plainly express such an intent was readily at hand. *See, e.g.*, 42 U.S.C. § 405(h) ("No action against the United States, the Secretary, or an officer or employee thereof shall be brought under Section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."); 38 U.S.C. § 511(a) ("the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. . . . [t]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court whether by an action in the nature of mandamus or otherwise.").

B. The Legislative History Supports A Legislative Intention to Permit Pre-Enforcement And Collateral Challenges.

The Mine Act, passed on November 9, 1977, had three primary purposes: (1) it combined all federal mine safety and health programs under a single statute (abolishing the Coal Mine Health and Safety Act of 1969 and the Metal and Nonmetallic Safety Act of 1966), (2) it transferred the administration of the program from the Department of Interior to the Department of Labor and created an independent Federal Mine Safety and Health Review Commission to replace the Department of Interior's Board of Appeals, and (3) it sought to provide a more effective program of standard setting and enforcement. 123 Cong. Rec. 19,927 (1977), reprinted in Subcomm. on Labor of the Comm. on Human Resources, 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (Comm. Print 1978) ("Leg. Hist." herein) at 909 (statement of Senator Javits, a proponent of the Senate bill which was adopted by both houses). Only the last point has relevance here. As shown below, the legislative history of the Mine Act supports a legislative intention to allow jurisdiction over statutory conflict and constitutional pre-enforcement challenges like those presented here.

The enforcement language adopted in the Mine Act derived from the Senate bill (S. 717), which in turn based "its enforcement approach on the Coal Act." 123 Cong. Rec. 19,927 (1977), reprinted in Leg. Hist. at 905 (1978) (statement of Sen. Williams, floor manager for the bill).[20] The enforcement procedure in S. 717 was substantially the same as that under the Coal Act. The enforcement mechanism in the bill still required an

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[20] See also S. Rept. 181, 95th Cong., 1st Sess. p. 34 (1977) ("Sen. Comm. Rpt." herein), reprinted in Leg. Hist. at 622: ("The procedure for enforcement of the Act is based upon the procedure under the Coal Act.").

inspection, citation, hearing, decision and order, with review of "the order" in the circuit courts of appeal, just as in the Coal Act.[21] This enforcement mechanism under the Coal Act had been found not to preclude pre-enforcement review. *Bituminous Coal Operators Ass'n v. Secretary of Interior,* 547 F.2d at 243 ("Because the Act neither states nor implies that § 816(a) furnishes the exclusive procedure for obtaining judicial review, other procedures are not precluded").

Congress' incorporation of the Coal Act enforcement procedure into the Mine Act without language reversing *Bituminous Coal* provides strong support that Congress intended to allow pre-enforcement challenges in federal district court. As this Court has found:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts a statute without change, *see Albemarle Paper Co. v. Moody,* 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.,* 340 U.S. 361, 366 (1955); *National Lead Co. v. United States,* 252 U.S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, *where, as here, Congress adopts a new law incorporating sections of a prior law,* Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorrillard v. Pons, 434 U.S. 575, 580-81 (1978) (emphasis added).

During the drafting and deliberation of the Mine Act, Congress was aware of the *Bituminous Coal* decision, citing it in the Senate Committee Report for approval of

[21] Sen. Comm. Rpt. pp. 34-41, in Leg. Hist. at 622-629. The Committee report makes clear that the review in the courts of appeals was intended to apply to "record reviews" of "final orders of the Commission." *Id.* at 40, in Leg. Hist. at 628.

the substantive aspects of the decision. Sen. Comm. Rpt. p. 14, in Leg. Hist. at 602. Congress' action in incorporating into the Mine Act, with minor amendment, the very provisions of the Coal Act which were subject to the *Bituminous Coal* decision, "without explicitly repealing" that decision, "gives rise to the presumption that Congress intended to embody" the *Bituminous Coal* decision in the new law. *Lindahl,* 470 U.S. at 782.[22]

In sum, no suggestion of preclusion of pre-enforcement or collateral challenges appears in the Mine Act. The only pertinent legislative history supports a legislative intent to permit pre-enforcement challenges.[23] In the ab-

[22] The Mine Act did change the judicial process for enforcement of penalty determinations. The Coal Act required the Secretary to seek enforcement, or the mine operator to seek review, of penalty determinations through a trial *de novo* in the federal district courts. Sen. Comm. Rpt. pp. 40-45, in Leg. Hist. at 628-633. The Mine Act eliminated the *de novo* trial and made penalty determinations reviewable in the circuit courts of appeals just like other Review Commission orders. The proponents of the bill urged this change for two basic reasons: (1) the U.S. Attorneys' offices were reluctant to bring enforcement cases for the relatively small amounts often involved and (2) the *de novo* trial requirement called for duplicative and wasteful hearings before both the agency and the federal district courts and substantially extended the collection time. *See* 123 Cong. Rec. 19,925 (1977), reprinted in Leg. Hist. at 88-89 (remarks of Sen. Williams); Sen. Comm. Rpt. pp. 15-16, 45 (May 16, 1977) in Leg. Hist. at 603-604, 633.

The legislative reasons behind the change in the enforcement of penalty determinations suggest nothing with respect to any intention of Congress to restrict access to federal district courts on pre-enforcement challenges. In the floor discussions and reports on this change, there was no discussion of an intention to preclude access to the general jurisdiction of the federal courts. Accordingly, this change provides no support for a congressional intent to preclude pre-enforcement challenges raising justiciable federal question issues.

[23] Importantly, no hint of such preclusion can be found in any of the debate concerning the Mine Act provisions. In fact, Senator Javits intimated to the contrary in explaining the bill to the Senate: in the process of explaining how the interests of mine operators

sence of any language or a legislative history demonstrating an intention to preclude access to the general jurisdiction of the federal district courts, there is no "clear and convincing evidence" that Congress intended the Mine Act to preclude Thunder Basin's pre-enforcement and collateral challenges here.

III. THUNDER BASIN PRESENTED A JUSTICIABLE CLAIM OF STATUTORY CONFLICT AND CONSTITUTIONAL INFIRMITY APPROPRIATE FOR FEDERAL QUESTION JURISDICTION.

Thunder Basin invoked jurisdiction under 28 U.S.C. § 1331 on the grounds that MSHA's actions exceeded its statutory authority and violated Thunder Basin's due process rights by insisting, under the threat of severe penalties and possible criminal liability, that Thunder Basin abandon an important statutory right granted through another statute as to which MSHA had no expertise. While the federal district court found a sufficient basis for the exercise of federal question jurisdiction, the Tenth Circuit disagreed. This Court has established the standard for determining whether federal question jurisdiction exists under Section 1331 as follows:

> For purposes of determining whether jurisdiction exists under § 1331(a) to resolve appellees' claims, it is not necessary to decide whether appellees' alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action "on which [appellees] could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). Instead, the test is whether " 'the cause of action alleged is *so patently*

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were protected in the bill, he stated that the bill "expressly protects the right of mine operators to contest any standard, citation, penalty or order before the Mine Safety and Health Review Commission *or before the Federal courts*." 123 Cong. Rec. 19,927 (1977), reprinted in Leg. Hist. at 909 (emphasis added). Beyond this statement, nothing in the legislative history provides any specific indication of a legislative intent concerning the availability of federal question jurisdiction or pre-enforcement challenges under the Act.

> *without merit* as to justify . . . the court's dismissal for want of jurisdiction.' " *Hagans v. Lavine*, 415 U.S. 528, 542-543 (1974), quoting *Bell v. Hood, supra*, at 683. (Emphasis added). See also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (test is whether right is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"). In light of prior decisions, for example, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and *Hagans v. Lavine, supra*, as well as the general admonition that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell v. Hood, supra*, at 684, we conclude that appellees' allegations are sufficient to sustain jurisdiction under 1331(a).

Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59, 70-71 (1978).

Applying this standard, this Court has often found federal question jurisdiction under 1331(a) in cases where it ultimately denied relief on the merits. *See Johnson v. Robison*, 415 U.S. 361 (1974); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59 (1978). We show below that, under the appropriate standard, Thunder Basin presented a justiciable claim of statutory conflict and constitutional deprivation appropriate for the grant of federal question jurisdiction.

A. The Federal District Court Had Jurisdiction to Hear a Statutory Conflict Challenge Outside MSHA's Expertise.

Since the inception of the NLRA, the NLRB and the courts have recognized the "employer's right to exclude non-employee union organizers from his property." *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S. Ct. 841,

845 (1992). *Accord, Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This right has been limited only in the "rare case" where unique obstacles make the employees inaccessible to union communication efforts. *Lechmere, Inc.*, —— U.S. ——, 112 S. Ct. at 848. While this Court has on occasion overturned NLRB efforts to broaden the "inaccessibility" exception, there has been no dispute that Congress, in balancing the conflicting interests of employees and employers under the NLRA, provided the employer with the basic right, absent such unique circumstances, to exclude non-employee union organizers from his property. *Lechmere, Inc.*, —— U.S. at ——, 112 S. Ct. at 848; *Babcock & Wilcox*, 351 U.S. at 109-12.

The insistence of MSHA that Thunder Basin accept the UMWA Designation is a plain transgression of Thunder Basin's NLRA rights. MSHA cannot cloak its disregard for Thunder Basin's NLRA rights under any claim of specific statutory authority. The Mine Act has no provision that requires MSHA to approve a union and its professional organizers as a "representative of miners" at a nonunion mine. Nor is there any legislative history to that effect.[24] Absent specific language to that effect,

[24] The Tenth Circuit in a separate case has noted that Congress did not address the "precise issue" of whether non-employees could be designated as a representative of miners and that the legislative debate "focused on the importance of miners participating in inspections of the mines in which they work." *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 450-51 (10th Cir. 1990). Regardless of the correctness of that decision on the merits, it is clear that having not addressed the issue of non-employees in general, Congress did not address the narrower issue of whether non-employee union organizers and a union itself may be designated as a "representative of miners" at a nonunion mine.

there is no basis for assuming that the Mine Act overruled the NLRA in this key respect.[25]

MSHA's action here raises a justiciable claim under 28 U.S.C. § 1331(a). Administrative action in derogation of a statutory right is a clear basis for federal question jurisdiction. *Traynor v. Turnage*, 485 U.S. 535 (1988); *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233 (1968); *Leedom v. Kyne*, 358 U.S. 184 (1958). An administrative agency has no authority to deprive persons of "a 'right' assured them by Congress" and "a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." *Leedom v. Kyne*, 358 U.S. at 189.

Pre-enforcement judicial review is particularly appropriate here because MSHA and the Review Commission have no expertise in the matter. The purpose of limiting judicial review of administrative decisions is "to permit agency expertise to be brought to bear on particular problems." *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). Here, that purpose is not served, for Thunder Basin's statutory conflict claims are outside the agency's domain of expertise. Thunder Basin's rights derive from another statute administered

[25] *See Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988), where this Court specifically addressed the controlling principles in a similar context:

> Accordingly, petitioners can prevail under their Rehabilitation Act claim only if the 1978 legislation can be deemed to have implicitly repealed the "willful misconduct" provision of the 1977 [Veterans Act] legislation . . . . "They must thereby overcome the 'cardinal rule . . . that repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)); [citations omitted]. . . . "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari, supra*, at 551.

and enforced by another administrative agency, the NLRB. MSHA and the Review Commission have no institutional experience or competence in recognizing the delicate balance Congress set between the rights of employees and employers in the NLRA, and thus cannot determine the destructive effect to that balance in granting a union advantages prohibited under the NLRA and in providing a union with the imprimatur of apparent government blessing as a legitimate representative of employees. Indeed, the Review Commission has declared in the recent *Kerr-McGee Coal* decision [26] that a mine operator, in asserting before the Review Commission its NLRA right to exclude non-employees from its premises, "is in the wrong forum" because the Review Commission's field of inquiry is limited to the Mine Act.[27]

In these circumstances the Court has found that jurisdiction exists for the district courts to resolve statutory conflict claims. For example, in *Traynor v. Turnage*, 485 U.S. 535, the Court found jurisdiction existed for district court review where it was alleged that regulations issued by the Veterans' Administration denying veterans benefits were inconsistent with rights granted under the Rehabilitation Act. Finding that the Rehabilitation Act

[26] *Kerr-McGee Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin.*, 15 FMSHRC ——, 1993 OSHD (CCH) ¶ 30,013 (1993), appeal pending, Case No. 93-1250 (D.C. Cir.)

[27] *Kerr-McGee, supra*, 15 FMSHRC at ——, 1993 OSHD (CCH) at 41,114. The Review Commission's entire frame of reference for its decision was the Mine Act: ". . . nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA. Our proper field of judicial inquiry is the Mine Act." *Id.* at 41,113. The Review Commission found *Lechmere* irrelevant on the grounds that it had nothing to do with the Mine Act and did not reverse the development of law under the Mine Act regarding representatives of miners (*id.* at 41,113). The Review Commission's analysis completely fails to address the deprivation of Kerr-McGee's NLRA right; indeed, it endeavors to avoid developing the slightest understanding of employer/employee rights under the NLRA.

was outside the "exclusive domain" of the Veterans Administration and that there was no "reason to believe that the Veterans Administration has any special expertise" to assess its own regulations in light of the Rehabilitation Act, the Court concluded that jurisdiction was proper in the district court. *Traynor v. Turnage*, 485 U.S. at 544-45.[28]

The statutory conflict here arises in the same manner as in *Traynor*. MHSA applies and the Review Commission interprets the Mine Act in a manner inconsistent with and in derogation of Thunder Basin's rights under the NLRA, a statute outside and beyond the domain of expertise of either agency. Accordingly, Thunder Basin presents, under *Traynor*, a justiciable claim to have the statutory conflict resolved through resort to an original action under 28 U.S.C. § 1331(a).

B. The Federal District Court Had Jurisdiction To Hear Thunder Basin's Constitutional Claims.

The Due Process clause of the Fifth Amendment assures that persons not be deprived of protected rights without an opportunity to object at a "meaningful" hearing. See *Mathews v. Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). As Justice Frankfurter emphasized in his concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951):

[28] Indeed, the Court in *Traynor* found jurisdiction even though then Section 211(a) of the Veterans' Readjustment Benefit Act (now 38 U.S.C. § 511(a)) prohibited jurisdiction by any court to review a decision of the Administrator on any "question of law or fact under any law administered by the Veterans Administration." Notwithstanding the clear legislative intention to preclude certain kinds of actions, the Court found "no clear and convincing evidence of any congressional intent to to preclude a suit" in federal district court challenging the validity of the Administrator's determination in light of a different statute (485 U.S. at 543-44).

> [T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Thunder Basin's complaint charged that the administrative procedures under the Mine Act violate the Due Process clause by forcing Thunder Basin to relinquish its protected NLRA rights before any administrative hearing on its objection to MHSA's UMWA Designation, or face the risk of substantial civil and criminal penalties, including daily penalties for refusing to comply immediately with the designation order. As demonstrated below, the coercive power of the threatened statutory penalties—and particularly MSHA's strong-arm tactic of threatening to impose penalties of up to $5,000 per day for refusal to submit to MSHA's UMWA Designation—would effectively force Thunder Basin to relinquish its clear and protected NLRA right even before the Mine Act administrative review process had begun, thereby depriving it of a "meaningful" opportunity to obtain effective review of MSHA's UMWA Designation.

The Mine Act and its administrative enforcement procedures are geared towards assuring prompt compliance with the Mine Act and MSHA regulations; "willful" or continuing violations are punished with substantial civil and criminal penalties, including daily civil penalties for noncompliance.[29] The Mine Act and MSHA regulations increase penalties for mine operators who refuse promptly to abate a MSHA citation. While the emphasis in the Mine Act and MSHA regulations on quick abatement of cited violations may make good sense in the context of

[29] As noted *supra*, pp. 5-6 if the citation is upheld, a civil penalty of up to $50,000 must be assessed, a penalty of up to $5,000 per day for noncompliance may be assessed, and criminal penalties may be imposed on individuals and companies for knowing or willful violations. Failure to abate a violation within the time set by the agency leads to higher penalties under the criteria set forth in the Mine Act and MSHA regulations.

threats to mine safety, it deprives Thunder Basin of its constitutional right to a fair hearing when applied to the statutory conflict between MSHA's designation of the UMWA as miners' representative and Thunder Basin's right under the NLRA to exclude non-employee union organizers from its property and records. Thunder Basin can only avoid the risk of these increased penalties by promptly abating its continuing refusal to accept the UMWA Designation—thereby relinquishing its independent NLRA right during the administrative process. Thus, as applied to Thunder Basin's statutory claim, the Mine Act compels Thunder Basin to surrender the very right it sought to protect by the administrative proceedings.

Significantly, the Review Commission has held that a mine operator cannot obtain a declaratory judgment on a disputed issue without there first existing a MSHA citation for some violation.[30] Absent any pre-enforcement declaratory relief from the Review Commission, Thunder Basin can only enter the administrative process by resisting compliance with MSHA's UMWA Designation, thereby risking substantial civil and criminal penalties if it is not successful in the administrative proceeding.[31]

The coercive power of such threatened penalties cannot be doubted. Placed between "the rock and the whirlpool," *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (quoting *Union Pac. R.R. Co. v. Pub. Serv. Comm'n*, 348 U.S. 67, 69-70 (1918)), a litigant in the position of Thunder Basin will be coerced into giving up its protected

[30] See authorities cited at n.7, p. 5, *supra*.

[31] It should be clear that Thunder Basin is not challenging the general statutory review scheme of the Mine Act or the Review Commission procedures in the abstract. It is in the special instance here—where these procedures, and other administrative actions by MSHA, force Thunder Basin to give up a clear and separate right under another statutory scheme—that the constitutional problem raised by Thunder Basin's complaint is presented.

right in order to avoid the possible imposition of severe civil and criminal sanctions for its exercise.[32] Indeed, faced with the prospect of such penalties, few mine operators, if any, would be able to resist the pressure to relinquish their statutory rights no matter how confident they were of the correctness of their legal position on the merits.[33]

The threat that Mine Act penalties will be used as a club to obtain compliance by mine operators is far from hypothetical; MSHA did exactly that in a contemporaneous dispute between MSHA and Kerr-McGee, which, like Thunder Basin, objected to the designation of the UMWA and its organizers as miners' representative in

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[32] *See Union Pac. R.R. v. Public Serv. Comm'n*, 248 U.S. 67, 70 (1918):

> [A]s conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of failure to accept it, and then to declare the acceptance voluntary . . .

See also United States v. Jackson, 390 U.S. 570 (1968) (statute which made the death penalty applicable only to those who contested their guilt before a jury was unconstitutional); *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another"); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (statements by criminal defendant were inadmissible when made under threat of removal from public office for exercise of Fifth Amendment right against self-incrimination).

[33] *See Ex parte Young*, 209 U.S. 123, 146-47 (1908) (Due Process clause violated where railroads could challenge reasonableness of rates established by administrative agency only in defending a criminal prosection for filing to comply with prescribed rates). *See also Abbott Laboratories*, 387 U.S. at 152-53; *Gardner v. Toilet Goods Ass'n*, 387 U.S. at 172 (observing that the procedure for challenging FDA regulations through litigation involving risk of criminal penalties is "inadequate" as a satisfactory alternative to a pre-enforcement declaratory judgment action in district court).

violation of Kerr-McGee's NLRA rights (J.A. 39-45). MSHA not only demanded that the mine operator comply with MSHA's UMWA Designation order, it explicitly threatened to invoke maximum daily civil penalties under the Mine Act if Kerr-McGee did not comply *within 24 hours* (J.A. 42-43). Kerr-McGee capitulated immediately under this threat of mounting daily penalties and complied with the designation under protest (J.A. 44).

After Kerr-McGee surrendered under this threat, Thunder Basin fully expected to receive the same treatment when MSHA inspectors issued a citation.[34] Rather than subject itself to MSHA's demand for immediate relinquishment of its statutory right, Thunder Basin sought the protection of the judiciary to assure that it would obtain review of MSHA's UMWA Designation decision without being forced to relinquish its independent NLRA rights in the process.

The forced relinquishment of Thunder Basin's statutory right to keep UMWA organizers from its property reaches constitutional dimensions because these rights cannot be fully restored to Thunder Basin by a subsequent vindication of its NLRA rights in the administrative process. As the Court explained in *Mathews v. Eldridge*, 424 U.S. 319 (1976), a constitutional claim of a deprivation of a right before an adequate hearing rests on the proposition that the injury cannot be adequately remedied by a post-deprivation hearing (424 U.S. at 331).

Here, the forced relinquishment of Thunder Basin's NLRA right gives UMWA organizers access to the mine, mine records and Thunder Basin employees during an administrative process that can take several years to re-

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[34] The counsel of record in this case was also counsel for Kerr-McGee in its dealings with MSHA on the designation of UMWA and was directly involved in the threats communicated in that matter.

solve[35]. Thunder Basin contended in its complaint that UMWA sought the designation as miners' representative as part of its union organizing campaign (J.A. 12). The UMWA's recurring presence at the mine gives it credibility and formal contacts with employees that can spill over to benefit the union in another NLRA representation campaign and taint irreparably the relationships between Thunder Basin's management and its employees. In these circumstances, Thunder Basin will have suffered irreparable injury by relinquishing its NLRA rights, even if it is ultimately successful in its Mine Act claim; a belated restoration of its NLRA rights may not eliminate the advantage gained by the UMWA during the years of the administrative process and appeals. Thus, the forced relinquishment of Thunder Basin's NLRA rights raises the specter of the "risk of erroneous deprivation" of those rights during the administrative process. *See Mathews v. Eldridge*, 424 U.S. at 335; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (one of the central concerns of the Due Process clause is prevention of unjustified or mistaken deprivations of rights).

In these circumstances, the Hobson's choice forced on Thunder Basin by MSHA—requiring an immediate abdication of its protected NLRA right at the beginning of the administrative process to avoid increased penalties for maintaining that right during the administrative proceedings—violates Thunder Basin's fundamental Fifth Amendment rights by effectively depriving Thunder Basin of a "meaningful" administrative hearing on its statutory-

[35] The parallel challenge to MSHA's designation of the UMWA as miners' representative at the Kerr-McGee mine next to Thunder Basin's mine has already taken more than 30 months from the citation to the Review Commission's decision, and review in the court of appeals is just commencing, with the likelihood of nearly another year before the matter is resolved by a court. During all of that time, UMWA organizers have had access rights to Kerr-McGee's premises, employees and records as the designated miners' representative under the Mine Act.

conflict claim. *See Mathews v. Eldridge*, 424 U.S. at 331. A Review Commission hearing to determine whether or not MSHA's UMWA Designation violates Thunder Basin's NLRA right can hardly be deemed constitutionally "adequate" when Thunder Basin has been coerced by the Mine Act's penalty provisions and MSHA enforcement tactics into relinquishing its NLRA right before the hearing has even begun, particularly where that right cannot be fully recovered by success in the administrative process.

Accordingly, the forced relinquishment of NLRA rights by threatened imposition of severe penalties during the administrative process—which troubled the court of appeals[36]—raises a sufficiently justiciable claim to have the constitutional challenge heard by the district court under Section 1331. The Due Process claim is collateral to the question of the merits of Thunder Basin's opposition to MSHA's UMWA Designation and, therefore, raises a separate legal question over which the district court had clear jurisdiction to decide. *See Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) (finding jurisdiction where the constitutional claim to a right to a pretermination evidentiary hearing was "entirely collateral to [the] substantive claim of entitlement" and claimant

[36] The court of appeals stated (Pet. App. 13):

> Threats of such penalties in the face of a bona fide interpretative dispute are indeed troubling. Such daily penalties, however, may be constitutionally valid so long as the operator "is accorded adequate opportunity to challenge their assessment at the administrative level before payment must begin" (citation omitted).

The court of appeals' response entirely misses the point of MSHA's explicit threat and Kerr-McGee's immediate capitulation—to coerce the surrender of an important right under the NLRA. The fact that the penalty assessments may not be actually collected until the end of the hearing process is not relevant to the constitutional infirmity in the agency's threat of daily penalties for maintaining a separate statutory right leading to the forced relinquishment of statutory rights before the hearing has even begun.

has raised "at least a colorable" constitutional claim for resolution); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59 (1978).[37]

C. The Case Is Ripe And Appropriate For Judicial Review.

This Court's landmark decision in *Abbott Laboratories* sets the framework for analysis of whether MSHA's UMWA Designation is appropriate for pre-enforcement judicial review. In *Abbott Laboratories*, the petitioners challenged labelling regulations of the Food and Drug Administration ("FDA") requiring drug manufacturers to print the generic name of a drug, as well as the proprietary name, on labels and advertising. In considering whether the controversy was ripe for judicial resolution, the Court considered two main questions: "the fitness of the issue for judicial decision and the hardship to the parties of withholding court decision." 387 U.S. at 149. The Court concluded that the issue was "fit" for judicial review, noting that the challenge to the FDA's regulation raised only a "purely legal issue" of the FDA's statutory authority and, therefore, did not require a fuller administrative record, that the regulations constituted "final" agency action in that the agency pronouncement was not subject to further administrative revision before the agency expected compliance and that the agency was prepared to seek to enforce its decision (*id.* at 149-52). Turning to the hardship on the parties from withholding immediate review, the Court observed that the agency action has a direct and immediate effect on the day-to-day

[37] See also *Public Util. Comm'n v. United States*, 355 U.S. 534, 540 (1958):

> [W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.

business of the regulated entities, requiring them either to comply or face the risk of serious criminal and civil penalties (*id.* at 152-54). The Court concluded:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory ban or some other unusual circumstance.

Id. at 153. *Accord, Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Bell v. New Jersey*, 461 U.S. 773 (1983); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).

The present case fits squarely into this line of cases. We establish below that MSHA's UMWA Designation is plainly "ripe" for review as a final agency action which the agency intends to enforce. Further, we demonstrate that the administrative review procedure under the Mine Act is inadequate to consider the statutory and constitutional claims and need not be exhausted prior to judicial consideration.

1. *MSHA's UMWA Designation Is Ripe For Judicial Resolution.*

Thunder Basin's pre-enforcement challenge to MSHA's UMWA Designation raises purely legal issues: the interrelationship of the Mine Act and the NLRA, and the constitutionality of the Mine Act administrative procedures in the circumstances here. Thus, as the Court observed in *Toilet Goods Ass'n*, 387 U.S. at 171: "[T]his is not a situation in which consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations."

Further, MSHA's UMWA Designation decision constitutes a final decision for purposes of judicial review.

Under *Abbott Laboratories* and its progeny, agency action is considered final for judicial review when the agency publicly articulates an unequivocal position and expects regulated entities to alter their behavior or face agency enforcement. *Abbott Laboratories*, 387 U.S. at 152; *Toilet Goods Ass'n*, 387 U.S. at 171. Plainly MSHA's UMWA Designation meets that "pragmatic" test. *Abbott Laboraties*, 387 U.S. at 149.

MSHA's decision designating the UMWA as a representative of miners and requiring Thunder Basin to honor the UMWA Designation was not a tentative ruling, subject to further MSHA consideration before citation and enforcement proceedings would be instituted. At the time Thunder Basin sought judicial relief, it had already protested MSHA's UMWA Designation and had received a reply from MSHA's District Manager rejecting the objections and reiterating MSHA's position (J.A. 49-50). At the preliminary injunction hearing, MSHA testified that Thunder Basin would receive a citation and daily penalties if it failed to comply with MSHA's UMWA Designation (J.A. 48). Accordingly, MSHA's letter rejecting the protest was its final word on the issue "[s]hort of an enforcement action." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980).[38]

The finality of MSHA's determination is further demonstrated by its handling of the identical issue at the neighboring Kerr-McGee mine in the same time frame. At Kerr-McGee, MSHA not only demanded that the mine operator comply with its UMWA Designation, it explicitly threatened to invoke daily civil penalties under the Mine Act if Kerr-McGee did not comply within 24 hours (J.A. 42-43)—a threat which led Kerr-McGee to

[38] The fact that MSHA had not yet begun to enforce its designation through the citation process is irrelevant to the conclusion that MSHA's designation order is itself sufficiently final for judicial review. Just as in *Abbott Laboratories*, and *Toilet Goods Ass'n*, the fact that the agency would eventually bring some enforcement action does not preclude review of the final agency decision upon which enforcement would be based.

capitulate and comply with that UMWA Designation under protest (J.A. 44). A more telling example of a final agency directive to which regulated entities must conform or face enforcement cannot be fashioned.

This case also meets the second part of the test for ripeness in *Abbott Laboratories*—*i.e.*, the effect on Thunder Basin in withholding pre-enforcement judicial review. The agency's action will have a direct impact on Thunder Basin. As in *Abbott Laboratories*, MSHA's UMWA Designation requires Thunder Basin to make significant changes in its everyday business practices, and subjects Thunder Basin to "the imposition of strong sanctions" if it fails to abide by MSHA's directive. 387 U.S. at 154. In these circumstances, as the Court found in *Abbott Laboratories*, the MSHA directive puts Thunder Basin in a "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories*, 387 U.S. at 152.

Abbott Laboratories also disposes of one of the main points against review raised by the court of appeals—assurances by MSHA in appellate briefs that stiff civil and criminal penalties would not be imposed "if a genuine interpretation question was raised" as to the designation determination (Pet. App. 12-13). As *Abbott Laboratories* makes clear, however, such assurances—even by the Department of Justice—are insufficient to defeat jurisdiciton (387 U.S. at 154).[39] Thus, here, as in *Abbott Laboratories*, the district court's jurisdiction

[39] The Court in *Abbott Laboratories* stated (387 U.S. at 154):

> The Government further contends that the threat of criminal sanctions for noncompliance with a judicially untested regulation is unrealistic; the Solicitor General has represented that if court enforcement becomes necessary, "the Department of Justice will proceed only civilly for an injunction . . . or by condemnation." We cannot accept this argument as a sufficient answer to petitioners' petition. *This action at its inception was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it.* (Emphasis added).

cannot be defeated by a subsequent representation by a government lawyer that serious penalties are "unlikely." Indeed, at the time that Thunder Basin sought injunctive and declaratory relief the record in district court showed that just two months before, MSHA had actually threatened Kerr-McGee with maximum daily penalties on the identical statutory interpretation issue, and the preliminary injunction hearing established that MSHA was prepared to do the same against Thunder Basin (J.A. 47-48).

2. *Thunder Basin Is Not Required To Exhaust Its Administrative Remedies Before Initiating Suit.*

The Government has suggested that "even if there were jurisdiction in the district court, there would be no basis for excusing petitioner's failure to exhaust its administrative remedies" (Opposition to Petition for Writ of Certiorari at p. 17 n.11). The Government's argument is misplaced.

First, this Court has consistently found exhaustion unnecessary for jurisdiction to hear collateral challenges to agency action on constitutional grounds, absent clear and convincing evidence that Congress intended to preclude the action. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991); *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court has noted: "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Second, the Government is confusing "exhaustion" with enforcement proceedings. Once the Court has determined that the pre-enforcement review sought here is not barred by the Mine Act and that the matter is ripe for review under *Abbott Laboratories*, the question of further exhaustion of administrative remedies is already answered: the particular agency action under judicial review is already "final" for purposes of judicial review and is not subject to further administrative revision prior to enforcement. MSHA's UMWA Designation is final and ripe for review by the courts under *Abbott Laboratories*.

Third, this case falls into the well-established exceptions to the exhaustion doctrine. *See Coit Indep. Joint Venture v. Federal Sav. & Loan*, 489 U.S. 561, 585 (1989); *Reiter v. Cooper*, —— U.S. ——, 122 L.Ed.2d 604 (1993); *McCarthy v. Madigan*, —— U.S. ——, 117 L.Ed.2d 291 (1992). Exhaustion is not required here for additional and overlapping reasons: the challenge here is to the adequacy of the agency process itself, *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979); and Thunder Basin will suffer irreparable harm if unable to secure immediate judicial review, *Bowen v. City of New York*, 476 U.S. 647 (1986). Moreover, the questions for which agency expertise is appropriate do not arise here: the questions are purely matters of law and statutory construction which will not benefit from the development of an administrative record, *McKart v. United States*, 395 U.S. 185 (1969). Finally, resort to the administrative process would be a futile act because at the time Thunder Basin sought judicial review, MSHA and the Review Commission had already disavowed any interest in harmonizing the principles of the Mine Act and the NLRA in enforcing MSHA's designation of the UMWA and its paid organizers as miners' representatives.[40] Thus, even if an "exhaustion" requirement were superimposed on *Abbott Laboratories*, Thunder

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[40] In its rejection of Thunder Basin's protest letter, MSHA informed Thunder Basin of its position on that matter (J.A. 49). The Review Commission likewise had already held by that time that it was not required to integrate the NLRA's concepts of collective bargaining representation into regulations implementing the Mine Act. *UMWA on behalf of James Rowe v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364-65 (1985), *aff'd*, 822 F.2d 1134 (D.C. Cir. 1987). Any remaining questions about the Review Commission's approach were settled in *Kerr-McGee Coal Corp.*, 15 FMSHRC ——, 1993 OSHD (CCH) ¶ 30,013 (1993), appeal pending, Case No. 93-1250 (D.C. Cir.), where the Review Commission held that the NLRA is not relevant to the determination of the designation of miners' representatives.

Basin would not be barred from immediate judicial review by the exhaustion doctrine.

IV. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED AND THE CASE REMANDED.

The court of appeals' conclusion that the district court lacked jurisdiction over Thunder Basin's complaint is based upon four fundamental errors in its analysis.

First, the court of appeals totally ignored pertinent authority from this Court establishing district court jurisdiction over statutory conflict and constitutional challenges in a pre-enforcement context. The Court of Appeals never cited *Abbott Laboratories, Traynor, Leedom, Oestereich,* or *Mathews,* and gave only a passing reference to *Toilet Goods Association.* The absence of reference to the pertinent authority by the court of appeals indicates that the court failed to recognize the circumstances under which this Court has previously permitted direct district court challenge to pre-enforcement administrative action.[41]

Second, the court of appeals misread the language and legislative history of the Mine Act and misconstrued congressional intent. The court of appeals fell into the same error as did the court of appeals in *Abbott Laboratories* in relying heavily on the congressionally-specified route for review of certain administrative decisions (Pet. App.

[41] The omitted precedent answers many of the objections to pre-enforcement review raised by the court of appeals. For example, *Abbott Laboratories* dealt directly with the court of appeals' concern that pre-enforcement review could hamper the effective enforcement of the Mine Act. The effective enforcement of the Food, Drug & Cosmetic Act is certainly of equal importance of the public welfare, but the Court had no difficulty in declaring that the regulatory work of the agency will continue. The Court noted (387 U.S. at 156):

> If the agency believes that a suit of this type will significantly impede enforcement or harm the public interest, it need not postpone enforcement of the regulation and may oppose any motion for a judicial stay on the part of those challenging the regulation.

7, 9-10) while failing to recognize that other routes, including pre-enforcement review over certain claims, were still possible. *Abbott Laboratories,* 387 U.S. at 139, 141. The court of appeals also erred in its reading of the legislative history, finding support in a change concerning penalty enforcement procedures even though the legislative history showed that change had nothing to do with any intention to preclude pre-enforcement challenges (see p. 23, n.22, *supra*). Moreover, the court of appeals overlooked the most important aspect of the legislative history of the Mine Act as it relates to the pre-enforcement judicial review at issue here: Congress was clearly aware of and did not overturn the decision in *Bituminous Coal Operators Ass'n v. Secretary of Interior,* 547 F.2d 240 (4th Cir. 1977), which approved pre-enforcement review in the district courts under the Coal Act. By incorporating the Coal Act enforcement scheme into the Mine Act without language reversing *Bituminous Coal,* Congress indicated support for pre-enforcement review in appropriate circumstances under the *Abbott Laboratories* formulation.[42]

Third, the court of appeals erred in concluding that the Mine Act's review procedures are adequate to protect Thunder Basin's due process rights (Pet. App. 11-14). Although the court of appeals was troubled by MSHA's threats to Kerr-McGee (Pet. App. 13), the court never came to grips with the fundamental problem—the Mine Act scheme of penalties for continuing non-compliance during the administrative process forces parties, such as Thunder Basin and Kerr-McGee, to relinquish their important statutory rights in order to avoid large penalties.[43]

[42] The court of appeals made no mention of *Bituminous Coal* in its decision.

[43] The court of appeals' blind spot on this issue is most clearly displayed in its explanation of why it is unlikely that Thunder Basin would incur penalties in the administrative process (Pet. App. 14):

> In any event, Thunder Basin may have the merits of its claims decided without risking substantial daily penalties. After re-

Again, the court of appeals' approach cannot be squared with the settled law established by *Abbott Laboratories* that when a challenger to an administrative order must risk substantial penalties for noncompliance, that avenue of review is "inadequate as a satisfactory alternative to the present [pre-enforcement] declaratory judgment action" in district court. *Toilet Goods Ass'n*, 387 U.S. at 172.

Fourth, the court of appeals totally ignored that Congress had legislated in the NLRA that unions should not have the special advantages that MSHA is demanding here. See *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S. Ct. 841 (1992). Contrary to the requirement imposed in *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988) and cases cited therein (see n.25 *supra*), the court of appeals made no effort to reconcile the NLRA right with Mine Act rights. As a result, the court of appeals underestimated the irreparable harm resulting from the forced acceptance of the UMWA as the miners' representative while the statutory issue is under administrative review (Pet. App. 14-16). The court of appeals concluded that it had no reason to assume that MSHA would allow the UMWA organizers to act beyond the scope of their rights outlined in the Mine Act (Pet. App. 14); but this overlooks the effect on the workplace if UMWA organizers become miners' representatives. Their presence at the mine, their participation in inspections and discussions with the miners about mine safety, their access to mine records, and the apparent alignment of government and union interests, all aid UMWA's union organizing effort by increasing the union's credibility, familiarity and accessibility with the employer, its mine and its employees. The district court found that Thunder Basin would suffer irreparable injury if it is forced to

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ceiving a citation it can abate the violation by complying, while proceeding with the appeals process.

It is evident that the court of appeals failed to recognize the importance of the statutory right and completely missed the point that Thunder Basin should not be forced by the threat of penalties to relinquish its statutory right without a hearing.

admit UMWA organizers to its facilities and that the UMWA may be seeking to gain entry to the mine to help it in its union organizing efforts (Pet. App. 28). Absent a conclusion that these findings were clearly erroneous or an abuse of discretion, and the court of appeals made no such determination, they must be credited for purposes of this jurisdictional review. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975).

For these reasons, the court of appeals' conclusion is flawed. The decision must be reversed and remanded for consideration on the merits.

CONCLUSION

Petitioner Thunder Basin respectfully prays that this Court reverse the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, and remand the case for consideration on the merits.

Respectfully submitted,

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